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STATUTE OF QUIA EMPTORES

What is a base, or qualified fee? May such a fee still exist?

It has been said by high authority that, since the passage of the Statute of Quia Emptores, 18 Edward I-A.D. 1290, it is not possible that such a fee, or qualified estate, can logically exist. In determining this question, we must consider that, while by the common law, contrary to the rule of the civil law, we are more or less controlled by the doctrine of stare decisis, it cannot be held that our law decisions must always be logical. We believe that such a rule in many cases would create injustice and lead to the perversion of natural equity, but before we consider this phase of the subject, let us determine, from an examination of the text writers and opinions of the various courts, just what is the extent of this kind of a fee or estate and whether it may be considered as an estate.

We find in Blackstone's Commentaries, Book II, at page 65, this description of this particular fee:

"A base or qualified fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, tenants of the manor of Dale; in this instance, whenever the heirs of A. cease to be tenants of the manor the grant is entirely defeated.

This estate is a fee, because by possibility it may endure forever in a man and his heirs, yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee".

As to the existence of any estate created or reserved in the grantor or donor, we find this statement in Blackstone, Book II, page 835, "No tenant * * * * since the enactment of the Statute of Quia Emptores could create a new tenancy to hold for himself". We will find therefore, that the fee which we are considering does not create or reserve, in the grantor or donor, an estate but a mere possibility of reverter.

In Kent's Commentaries,[1] it is said that "A qualified, base or determinable fee is an interest which may continue forever, but the estate is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because it is said, they have a possibility of enduring forever".

In Washburn on Real Property,[2] we find this illustration, quoting in part from Blackstone, "A limitation to one and his heirs, tenants of the manor of Dale, etc., or for so

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[1]4 Kent's Commentaries, 5th Ed. page 9.

[2]Washburn Real Property, 6th Ed. page 8.

long as a certain tree stands, or until the marriage of a certain person, or till a man shall go to, or return from Rome, or till certain debts are paid, or so long as A., or his heirs shall pay B. a certain sum per annum, or so long as St. Paul's Church shall stand, or until a prescribed act shall be done, or until a minor shall attain the age of twenty-one years and the like."

In examining the American cases, it appears that this form of an estate is quite uniformly held to exist. In an early Pennsylvania case, we find this holding, to wit: "An estate limited to a person and his heirs, with a qualification annexed to it, by which it is provided that it must determine whenever the qualification is at an end, creates a qualified or determinable fee". Also in the same case it is held that "the terms base fee, qualified fee, and determinable fee are used interchangeably to denote a fee which has a qualification subjoined thereto and which must be determined whenever the qualification annexed thereto is at an end". As to the place wherein said qualification must be found, or exist, it is held in the same Pennsylvania case that the qualification must be found in the instrument itself, "presumably as being a part of the limitation of the estate," and said case further holds that "no special or technical words are required to establish or qualify the limitation."[3]

In a New Jersey case, it was held that "where a deed was made to a grantee of land, so long as used for a canal, that the estate continued until the qualification upon which it is limited is at an end, and that the grantees have the same rights and privileges over the estate as if it were a fee simple, so long as the estate continues."[4]

In Massachusetts, it is held that "The estate known as a qualified or determinable fee exists, and that a grantee

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[3]Bryan v. Spiers, 3 Brewst. (Pa.) 580.

[4]State v. Brown, 27 N. J. L. 13.

holding a deed which conveyed to a corporation land for a special purpose could not convey to a third person an estate in fee simple absolute."[5]

This estate is described in another American holding as "A fee which is liable to be determined by some act or event, expressed in its limitation to circumscribe its continuance, or inferred by law as bounding its extent."[6] In another Pennsylvania case, occurs this description and comment, "A qualified, base or determinable fee is an interest which may continue forever, but the estate is liable to be determined by some act or event circumscribing its continuance or extent, as to a man and his heirs so long as A. shall have heirs of his body, or to a man and his heirs tenants of the manor of Dale, or till the marriage of B., or so long as a certain tree should stand.

In these and similar cases, the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitation, or when the qualifications, annexed to it, are at an end. If the owner of a determinable fee convey in fee simple, the determinable quality of the estate follows the transfer. Nemo potest plus juris in alienum transferre quam ipse habet." The general policy of this country does not encourage restraint upon the power of alienation of land. "A qualified, base or determinable fee is created by deed, by will or by some other instrument of writing in express terms, and cannot be implied by law. The instrument which creates the estate shows at the same time its limitations. It is part and parcel of the title, and hence there is no injustice in the purchaser taking the estate with the determinable quality annexed to it.[7]

If land is conveyed to a trustee to hold the same for a special use, or to sell and convey the same, "the designa-

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[5]First Universalist Church of North Adams v. Boland, 155 Mass. 171.
[6]McLane v. Bovee, 35 Wis. 27.
[7]Union Canal Co. v. Young, 1 Wharton 427.

tion of such use does not create a base or qualified fee";[8] and it seems that in such case the trustee may sell and convey, applying the proceeds to the same uses as those for which the land was given.[9]

If, however, an estate is conveyed in fee, "for a special purpose and no other," the fee is a base fee and determinable on the cessation of the use of the property for that purpose."[10] In an Illinois case, it was held that "should the happening of the event upon which the estate is to determine become impossible it is converted into an estate in fee simple absolute.[11] As to the user or right of enjoyment of the one who holds land under this restricted fee or estate we find this holding: "Under a deed conveying only a qualified fee, the grantee has, while his estate continues, the same right to exclusive possession and enjoyment of the land granted and as complete dominion over it for all purposes as though he held it in fee simple absolute,"[12] and he is not generally liable for waste,[13] but it is to be presumed that if the event, upon which the estate is to determine, is quite likely to happen in the near future, the owner of the land, subject to such a fee, would be liable for equitable waste.[14]

As to the right to inherit or convey property subject to this form of holding, we find these decisions: "A determinable fee is descendable to heirs and may be assigned, devised or conveyed,"[15] although the owner cannot convey a title in fee simple absolute, and his grant only conveys a determinable fee."[16] In an Indiana case, where by the will

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[8]Brandle v. German Reformed Congregation, 33 Pa. St. 415.
[9]Griffiths v. Cope, 17 Pa. 96; Kirk v. King, 3 Pa. 436.
[10]Scheetz v. Fitzwater, 5 Pa. State 126.
[11]Keffler v. Keffler, 56 N. E. 1094.
[12]N. J. Zinc Co. v. Morris Canal, Etc. Co., 44 N. J. Eq. 398.
[13]U. S. v. Torrey Cedar Co., 154 Fed. 263.
[14]Vane v. Lord Barnard, 2 Vernon Chancery (Eng.) 738; Stevens v. Rose, 69 Mich. 259.
[15]Coquillard v. Coquillard, 62 Ind. 426.
[16]First Universalist Society of North Adams v. Boland, 155 Mass. 171.

of her father a daughter is given land in fee simple, subject only to the contingency that she shall die without issue, or that her surviving issue shall die before arriving at full age, the estate taken is a determinable fee."[17]

As to a conveyance in the form of a lease, we find this holding, "A lease for as long as the lessee, his heirs or assigns, shall pay a stipulated ground rent, and shall comply with all the covenants herein contained," was held to create a determinable fee in land.[18]

Considering that the Statute of Quia Emptores was intended to apply to estates in fee simple absolute,[19] and that no estate remains in the grantor or donor, but merely a "possibility of reverter", which at common law could not be conveyed to a third person,[20] there would seem to be no legal objection to the existence of this form of a fee. In Pennsylvania, however, this possibility of reverter may be conveyed away by the grantor or his heirs,[21] but we see no reason why this should work against this form of a fee, and it has always seemed to us that this Pennsylvania right to convey a possibility of reverter to a third person is a legal right which for purposes of utility should be held to exist.

Furthermore, a base or qualified fee furnishes a mode of creating an estate, the use of which may be restricted to a certain definite purpose. This is often desirable where one wishes to devote his land to religious, charitable, educational or other like purposes. Therefore, it would seem that as this form of a fee serves a very useful purpose it should, taking all considerations into account, be allowed to exist.

ROBERT W. LYMAN

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[17]Greer v. Wilson, 108 Ind. 322.
[18]Atkinson v. Orr, 83 Ga. 34—9 S. E. 787.
[19]Blackstone, Book II, page 136.
[20]Brattle Square Church v. Grant, 3 Gray (Mass.) 142-150; First Universalist Society of North Adams v. Boland, 155 Mass. 171.
[21]Slegel v. Lauer, 148 Pa. St. 236; Scheetz v. Fitzwater, 5 Pa. State 126.

COMPULSORY VOTING

Do our elections go by default because the electors are afraid to exercise their voting privilege, and, if so, what may be the remedy? It has been said that if our experiment in democracy fails it will not be due to the success of military forces commanded by some brilliant general, but that our downfall will be brought about by "General Apathy". Is it not true that in many of our elections general apathy seems to "reign supreme," for it is notorious that in many elections only a minority of the voters take the trouble to go to the polls and vote. Would compulsory voting cure this evil? For if it is not an evil, we might as well give up and go back to an aristocratic form of government. Does it not happen often that some salutary laws, enacted for the benefit of those who are cursed by an uncontrollable appetite, are repealed by the efforts at election time of a minority of the voters, who intend to cater to the damnable appetite of such unfortunates, for the purpose of pecuniary gain to those who bring about such repeal?

That we may study the provisions of the Compulsory Voting law, we give herewith the substance of the acts enacted by the Commonwealth of Australia in 1918 and 1925. Also, the opinion of the High Court of the Commonwealth construing said law and the regulations for enforcing the same. The Australian Statute for Compulsory Voting provides that "it shall be the duty of every elector to record his vote at each election". It further makes provision for the reporting to certain authorities the names of those electors who have not voted at the election, and to certify the list by a declaration under his hand, which certification shall be prima facia evidence of the contents thereof and of the fact that the elector named therein did not vote at the election. The statute also provides that notice shall be sent by mail to such persons as have failed

to vote, calling upon them to "give a valid, truthful and sufficient reason why they failed to vote". The reply of the delinquent elector shall be mailed to a certain officer within twenty-one days after the notice is received, which reply shall state "the true reason why such elector did not vote". If such delinquent elector is unable for any reason to make such reply within the specified time, this may be done by any other elector who has personal knowledge of the facts, which statement by such other elector must be duly witnessed and so may be treated as a compliance with the law in this respect. The officer receiving this report shall endorse upon the same his opinion as to whether the reason given is "a valid and sufficient reason" for the failure of the elector to vote. If no answer is received to the officer's request for the same, that fact shall be noted on the list of electors opposite the delinquent elector's name.

Within two months after such answer of the delinquent elector should have been made, the officer to receive the same shall send to the Commonwealth Electoral Officer a certified declaration containing the names of the electors who did not vote at the election, the names of those whom or on whose behalf an answer was returned and the names of those who failed to reply within the required time. "Every elector who fails to vote at an election without a valid and sufficient reason, or fails to make the proper return for his failure to vote, or who shall state a false reason in said return for not having voted, shall be deemed to be guilty of an offence, the penalty for which shall be a fine of two pounds". The proceedings for punishment of such an offence shall not be instituted, except by the Chief Electoral Officer or by an officer thereto authorized in writing by said Chief Electoral Officer.

The machinery for enforcing this statute makes provision that when the aforesaid reply of the elector states reasons for his failure to vote, which in the opinion of the officer to receive the same is not a valid and sufficient

reason, said officer shall, after endorsing his opinion thereon, notify the elector thereof and inform him that he has the option of having the matters dealt with by the Commonwealth Electoral Officer or by a court of summary jurisdiction.

Any elector to whom said notification has been sent who desires the matter to be dealt with by the Commonwealth Electoral Officer and who is prepared to abide by the decision of that officer, may deposit with the Returning Officer such sum as that officer determines, to be appropriated in payment of the penalty, if any, which the Commonwealth Electoral Officer may impose upon him. Upon the receipt, from an elector who has failed to vote, of a notification consenting to the matter being dealt with by the Commonwealth Electoral Officer and to abide by the decision of that officer and of the deposit required, the officer receiving the same shall transmit such notification, together with the elector's reply, stating his reason for having failed to vote and the Receiving Officer's opinion thereon, to the said Commonwealth Electoral Officer. Said Electoral Officer shall, upon the receipt from the Returning Officer of the statements, consider all the facts, and if satisfied that the elector concerned failed to vote at the election without a valid and sufficient reason for that failure, he may make an order imposing upon such elector a penalty not exceeding two pounds, and notify the Returning Officer thereof and of the time allowed for payment. Any penalty so imposed by such Electoral Officer in pursuance with this regulation shall be a debt due to the Commonwealth and may be recovered accordingly.

The Chief Electoral Officer may review any order made by a subordinate Electoral Officer in pursuance with these regulations, and may, if he is of opinion that the circumstances justify such action, remit the penalty imposed by the order otherwise; and if the Chief Electoral Officer imposes a penalty on such information being sent to the

Returning Officer, he may deduct such amount as was so imposed from such deposit as was made by the elector for that purpose.

If the Divisional Returning Officer is satisfied that there has been a violation of the Compulsory Voting Law by an elector, who did not choose to submit the matter, as aforesaid described, to the Chief Electoral Officer, he shall forthwith cause proceedings to be taken against such elector in a court of summary jurisdiction. In such proceedings, in said court, the said Returning Officer shall send to the Court the elector's reply as to his reasons for having failed to vote. Thereupon the Court shall, whether the defendant is present or not, consider the contents of the elector's reply as if it were given in evidence before the Court—"If the defendant attends the court, and sets up a defence differing in substance from the statement contained in his reply, the Court shall, if it dismisses the information, do so without awarding the defendant the cost of his defence". In such proceedings, in a court of summary jurisdiction, a notice shall be given to the alleged delinquent elector that he may attend the court and answer the charge in person, or may, at any time, not less than seven days before the date fixed for the hearing, lodge with, or send by post, to the prosecuting officer, a declaration setting out any matter which he desires to set out in answer to the charge; this declaration will be sent to the Court for consideration of the matter set out therein as if it were given in evidence before the Court, subject to evidence in reply adduced by the prosecuting officer. It shall be the duty of the prosecuting officer to inquire into the truth of said declaration, and unless he withdraws the prosecution, to bring the same and his findings to the notice of the Court. The Court shall, at the hearing of the case, consider the said declaration, whether the defendant is present or not, as if the matter therein set out were given in evidence before it, but if the defendant at-

tends the court and sets up a defence differing in substance from the statement contained in his declaration, the Court shall, if it dismisses the prosecution, do so without awarding the defendant the cost of his defence. The prosecuting officer shall be given proper time to make answer to the defendant's declaration. When a declaration, as aforesaid, has been lodged, as provided, with the Court, it shall proceed with the hearing and determination of the case, whether the prosecuting officer is present or not, and shall consider such declaration as if the matter set out therein had been given in evidence before it, and shall, notwithstanding the absence of the prosecuting officer, permit testimony to be given for the prosecution by any witness who is summoned by, or attends on behalf of, the prosecuting officer.

THE LAW HELD CONSTITUTIONAL

The constitutionality of the law relating to compulsory voting was tested and determined before the High Court of Australia in the case of Judd v. McKeon; Judd being the delinquent elector and McKeon the officer representing the Commonwealth. In the majority opinion, it was set out that "The appellant Judd was convicted of failing to vote at an election of senators of New South Wales without a valid and sufficient reason for such failure, contrary to the provisions of law in such case made and provided"—which law provides that "it shall be the duty of every elector to record his vote at each election" and that "every elector who fails to vote at an election without a valid and sufficient reason for such failure shall be guilty of an offence." On an appeal to Quarter Sessions, the conviction was affirmed and this appeal is brought by special leave from that decision.

The appellant contends that "the enactment of this statute above quoted is beyond the powers of the Com-

monwealth Parliament, and that the reason he gave for his failure to vote was a valid and sufficient reason".

In this opinion, it is held that the first contention cannot be supported. The Constitution provides that the "Parliament is empowered to make laws prescribing the method of choosing senators subject to one condition only, viz—that the method shall be uniform for all the States. This power, subject only to the condition or qualification named, is "plenary and unrestricted," and the only reason advanced for denying to Parliament the right to prescribe that every qualified elector shall record his vote was founded on the use of the word "choosing". It was said that "the choosing of a candidate implied a desire on the part of the elector that that candidate should be elected", and that consequently the power of the Parliament was limited to prescribing the method by which electors, desiring that a candidate should be elected, should signify that desire We do not think the meaning of the expression "choosing senators" can be so restricted. In common parlance, "to choose" means no more than to make a selection between different things, or alternatives submitted, "to take by preference out of all that are available". As an illustration of the meaning of the corresponding noun "choice," the Oxford Dictionary quotes the phrase, "I have given thee thy choice of the manner in which thou wilt die", and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or the other of the alternatives submitted is desired by the person who is to exercise the right, or in other words to choose between them. It remains to consider whether any of the reasons given by the appellant was a valid and sufficient reason. The reasons given were as follows, viz—"Without prejudice to my legal rights, if any: All the political parties and their candidates, participating in the election, support and do all in their power to perpetuate capitalism with its

exploitation of the working classes, war, unemployment, prostitution etc".

"The Socialist Labor Party of which I am a member, stands for the ending of capitalism and consequently its members are prohibited from voting for the above mentioned supporters of capitalism, and that the Socialist Labor Party has paid and lost hundreds of pounds in Federal Election deposits for its candidates. * * * * The unjust penalty of 25 pounds on each candidate penalizes us, if we participate in a Federal Election, and your letter suggests that we will be penalized if we don't. Is that fair?" These reasons do not purport to express the views of the appellant, but those of the party to which he belongs, and in that view, his only excuse, which is clearly insufficient, is that his party prohibits him from voting. But if the reasons be taken as representing the individual view of the appellant, they amount to no more than the expression of an objection to the social order of the community in which he lives.

In our opinion such an objection is not a valid and sufficient reason for refusing to exercise his franchise.

One of the Justices is of the opinion that the question as to the validity and sufficiency of an elector's reason for not voting is a question of fact only and not a question of law in our case. One of the Justices, who holds against the majority, gives as his opinion that if the elector "has no preference" that would constitute a valid and sufficient reason for his being excused from voting. The majority holding is that the appeal of Judd should be dismissed".

AS TO THE RESULT OF THE COMPULSORY VOTING LAW

In a letter from Hon. J. D. Farrar, the Chief Electoral Officer for the Commonwealth of Australia, he says as a result of the law that "the compulsory voting law was pass-

ed in 1924, since when the general elections (in 1925) and a referendum (in 1926) have been held. The percentages of voters to electors enrolled on those occasions were respectively 91.31 and 91.07. The percentage of voters to electors enrolled at the general elections next preceding the introduction of compulsory voting was 57.95. The constitutionality of the law was tested before the High Court of Australia in the case of Judd v. McKeon and it was held to be valid".

It has been said that many people do not have sufficient education to entitle them to vote, or that they have little property and therefore they should not be allowed to vote. If they do not have sufficient education who is to blame? Should it not be the business of the Government to provide for, and require that, all persons brought up in the State should receive a sufficient amount of instruction and training to enable them to exercise this privilege. Besides, the educated and well to do sometimes have less regard for the welfare of the State than those of more limited education and less wealth.

When high officials and members of the Judiciary of our second largest city turn aside from their duty to do honor to the memory of notorious gunmen and leaders of gangs of outlaws, something is wrong, and we wonder if crime and politics would not be divorced in Illinois, if that state should adopt Compulsory Voting laws before our governments are completely given over to domination by the criminal classes?

ROBERT W. LYMAN

MOOT COURT

MULLIGAN v. CARSON

Contracts—Terms on Invoices of Bailee Construed as Offer—Delivery of further Goods by Bailor Acceptance

Liens—General Lien when Created by Contract

Constitutional Law—Act of May 23, 1907, P. L. 228 as Amended by Act of May 20, 1913, P. L. 271, Attempting to Give General Liens to Certain Classes—Special Law Creating Lien Unconstitutional—Constitution of Pennsylvania, Art. III. Sec. 7

STATEMENT OF FACTS

Carson, a dyer, printed on his invoices and his bills the following notice: "Notice—all goods received only on condition that they are subject to a general lien, not only for the dyeing and finishing thereof, but also for the balance of any former account due." Moss, over a period of years, sent Carson yarns to be dyed. Finally Moss made an assignment for the benefit of creditors. At the time, Carson had in his possession yarns sent by Moss of the value of $5000 upon which $500 was due for the dyeing of the same. Moss was indebted to him in the sum of $4,500 upon other similar transactions. Moss's assignee demanded delivery of the yarn and on refusal, brings replevin.

Flood, for plaintiff.

Plum, for defendant.

OPINION OF THE COURT

Rupp, J. It is a recognized rule of law that an assignee for the benefit of creditors may bring suit in regard to the property assigned, in his own name. It is also true that an assignee who takes with notice of equities in favor of third persons is bound thereby, and no also, if he is chargeable with notice of equities existing against his immediate assignor: 5 C. J. 974; Franklin Fire Insurance Company v. West, 8 Watts & Sergeant 350; Seymour v. McKinstry, 106 N. Y. 230, 12 N. E. 348. It is not necessary to make any further attempt to add anything to what was said in the opinions in those cases. Plaintiff therefore is entitled to all the rights in the goods that Moss had at the time of his assignment.

The defendant is possessed of goods which originally belonged to Moss, to the value of $5000 upon which $500 is due for the dyeing of the same. Plaintiff admits the defendant's lien as to this amount, but the question to be answered by the court is whether defendant can withhold the goods for the sum of $4,500 which is due him upon other similar transactions with Moss.

The first question of law to be decided is whether a person engaged in the business of dyeing silk or other goods is entitled to a lien upon the silk of another that comes into his possession for the purpose of being dyed, for the amount of the account due from the owner of such silk by reason of the work and labor performed on other silk of the same owner, such other silk being out of the possession of the owner.

The first legislative attempt to create a general lien for this particular industry was the Act of May 23, 1907, P. L. 228, entitled: "An act concerning liens of manufacturers and throwsters of cotton, woolen, and silk goods," the material parts of which statute, as amended by the act of May 20, 1913, P. L. 271, read as follows:

"All persons or corporations engaged in the business of manufacturing, spinning, or throwing cotton, wool, or silk into yarn or other goods, or engaged in the business of dyeing cotton, wool, or silk yarns, shall be entitled to a lien upon the goods and property of others that may come into their possession for the purpose of being manufactured, spun, or thrown into yarn or other goods, for the amount of any account that may be due them, or any note or notes taken on account of such account, from the owners of such cotton, wool, or silk, by reason of any work and labor performed, and materials furnished, in or about the manufacturing, spinning, dyeing, or throwing of the same or other goods of such owner or owners."

The second section of this statute provides that the goods may be sold for the lien, under execution upon any judgment recovered.

The Act of May 23, 1907, was first construed by Judge McPherson of the United States Circuit Court in the case of L. H. Kemmerer & Co., 205 Fed. 108, to exclude dyers. He said there, "A familiar rule requires the act to be strictly construed; it changes a long-established doctrine of the common law—that a bailee's lien for work or materials can only be enforced against the particular goods benefited thereby—and extends the scope of the lien so as to charge the goods, not only for the benefits done to themselves, but also for benefits done previously to other goods of the bailor, thus enlarging a particular lien into a general lien. Moreover, an additional reason for strict construction is found in the fact that the statute is special, its purpose is to advantage only one class of bailees."

Seven days after this decision, the legislature amended the Act of 1907 to include dyers. There can be no doubt that this legislation was intended to give to "manufacturers and throwsters, spinners and dyers of cotton, wool, and silk goods" a general lien. It is equally clear that it was not the intention by this legislation to give the same right of lien and peculiar remedy for the collection of debts to other manufacturers and tradesmen.

In the case of Gerli v. Perfect Silk Throwing Co., 70 Sup. 299, the Superior Court declared the act of 1913 unconstitutional on the grounds that the act gave "to a special limited class a right of lien and a peculiar remedy for the collection of debts which it does not give to other citizens and corporations." The act was declared to be in conflict with Article III, Sec. 7, of the Constitution of Pennsylvania, which forbids the general assembly to pass any local or special law "authorizing the creation, expulsion or impairing of liens; * * or providing or changing methods for the collection of debts, or enforcing of judgments." See also Vulcanite Portland Cement Company v. Allison, 220 Pa. 382; and Taylor Lumber Co. v. Carnegie Institute, 225 Pa. 486.

The defendant contends that the decision of the Superior Court is not conclusive authority and that the constitutionality of the act has never been decided by the Supreme Court. While the Superior Court is not the court of last resort in this Commonwealth, it is a tribunal of such importance that the Federal Courts have followed its decision construing this statute. See Berlet v. Lehigh Valley Silk Mills, 287 Fed. 769; also Erie R. Co. v. Hilt, 247 U. S. 97, 100.

In view of the foregoing decisions, the answer to the first question must be founded on common law principles. Defendant rests his lien on the ground of an implied contract arising out of the mode of dealings between the parties. Plaintiff argues that a lien may be created by an implied contract only under circumstances clearly indicating an intention of the parties to create a lien on the specific property, and that if words relating to a proposed lien express future actions in regard to the creation of the lien, and the lien is also to take effect by attaching in the future, no lien is created that could attach to the property. There can be no doubt that a lien may arise by implication from the general usage of trade or from the manner of dealings between the parties. General liens, however, must be established by inveterate usage, otherwise the courts will treat them as encroachments on the common law.

In 2 Kent's Commentaries 637, the following proposition is laid down: "A general lien for a balance of accounts is founded on custom, and is not favoured; and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between

the parties, to establish it. The usages of any trade, sufficient to establish a general lien, must, however, have been so uniform and notorious as to warrant the inference that the party against whom the right is claimed had knowledge of it."

In Steinman v. Wilkins, 7 Watts & Sergeant 466, a distinction was drawn between a commerical lien, which is the creature of usage, and a common law lien, which is the creature of policy. The first gives a right to retain for a balance of accounts; the second, for services performed in relation to the particular property.

The transactions between Moss and the defendant covered a period of years during which time there was ample opportunity for them to establish some definite understanding as to the rights of each party and fix a basis for future dealings between them. Under these circumstances, the defendant might hold one lot of yarns until he was paid for the work performed upon other lots which had been delivered to Moss. It is obvious that their relations in the past were satisfactory, and it is evident that there was no occasion for the defendant to enforce his lien. Is it possible then, to infer from these circumstances that the defendant by his conduct has waived his rights?

The principle is further considered in 2 Kent's Commentaries 637, to the effect that "This general lien may also be created by express agreement; as where one or more persons give notice that they will not receive any property for the purposes of their trade or business, except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of this account. All persons who afterwards deal with them, with the knowledge of such notice, will be deemed to have acceded to that agreement."

In Overton on Liens, page 52, section 45, cited in Firth v. Hamill, 167 Pa. 382, it is said, "A general lien, therefore, must be shown to have its existence through a proven custom of the trade, or it may be shown by a notice of such claim brought home to the bailor prior to his making a deposit of goods; any further bailment will be presumed to be made by assent on the part of the bailor. This applies to all cases where the bailee is not compellable by law to receive the bailment."

This brings us to the second question as to whether the notice printed in the invoice must be considered in determing what the contract was, and that said words constituted an express condition that became a part of the contract between the parties.

The facts show that the notice of this general condition was printed on invoices mailed to Moss. Plaintiff contends that the terms as printed on the invoices were brought to the acceptor's notice after

the contract was completed, and therefore there was no acceptance of such terms.

A great many contracts are now made by delivery, by one of the contracting parties to the others, of a document in a common form, stating the terms by which the person delivering it will enter the proposed contract. Such a form constitutes the offer of the party tendering it. If the form is accepted without objection by the person to whom it is tendered, this person is, as a general rule, bound by its contents; and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not: Golden v. Pittsburgh R. Co. 28 Sup. 313.

In the present case, the invoices were in use during the whole course of dealing with Moss, covering a period of years. In the absence of any denial that the notice or condition was received and read by Moss or his employees, the presumption is that it was received and read. No evidence was offered by the plaintiff to rebut this presumption. The transactions between the parties were many and frequent, and no effort was made by the plaintiff to show that Moss or his employees did not receive and read the notice, or that they were not aware of the condition upon which the defendant received the goods, and the conclusion is irresistible that they sent the goods in question with knowledge of the condition upon which alone they would be received; and under this state of facts the contract has the same force and effect as if it had been formally signed by the parties.

By his conduct, Moss precluded any defence as to absence of notice and showed acquiescence in the stipulation. His silence and his willingness to continue his relations with defendant may be taken as an acceptance of the terms.

Where parties make particular agreements and stipulations between themselves, such agreements and stipulations take the place of general principles of law. The parties make the law in such cases for themselves: Gray v. Wilson, 9 Watts 512; Firth v. Hamill, 167 Pa. 382.

Judgment for defendant.

OPINION OF SUPREME COURT

The only basis to support the claim for a general lien, in the instant case, is on that of a contract. That the terms of a contract may be shown by acts and circumstances as well as by words, written or oral, is axiomatic. Is such a contract shown here? It is a question of fact whether Moss knew of the conditions, in Carson's offer to dye goods, that all such goods were subject to a general lien.

Although it is not expressly shown that Moss knew of these conditions, yet there is ample evidence on which to support the finding of the court below (acting as jury) that Moss knew of these conditions when he delivered goods. Such being the case, by delivery he accepted the offer of Carson and is bound thereby. He contracted to give a general lien to Carson and his assignee is bound, thereby.

The case is identical with Firth v. Hamill, 167 Pa. 382. See Hecht v. Dye Works, 66 Super. 97 to the same effect. The judgment of the learned court below is affirmed.

VANCE v. YARNALL

Agency—Agent Appropriates Funds to Personal Use by Checks on Bank against Account of Principal—Bank not Liable unless Actual Knowledge or Bad Faith

Uniform Fiduciaries Act May 31, 1923, P. L. 468, Sec. 9.

STATEMENT OF FACTS

Vance, agent for Yarnell, was authorized to draw checks on the account of his principal in the Merchant Bank. He drew checks in this manner to the extent of $10,000 and deposited them in his personal account in the same bank. He later spent this money in stock speculation. Yarnell now sues this bank for the $10,000.

Weiss, for plaintiff.

Weaver, for defendant.

OPINION OF THE COURT

Keller, J. As a general rule, every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that its source can be traced to the will of the alleged principal: 2 C. J. 562. This rule was recognized in Pennsylvania starting with the case of Smith v. Ebert, 11 Kulp 63. In that case, the court said, "the rule is as to third parties in their dealing with an agent, that they must be upon their guard, and if they deal with him they do so at their own risk." The rule is further asserted in Dodge v. Williams, 47 Superior 302; Lauer Brewing Co. v. Schmidt, 24 Superior 396; Interstate Securities Co. v. Third National Bank, 231 Pa. 422. But this well known, general rule has been partly changed in Pennsy-

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lvania. The legislature in 1923 passed an Act entitled Uniform Fiduciaries Act (May 31, 1923, P. L. 468, Sec. 9) and the wording of the Statute describes just such a situation as we have in this case. The act reads, "If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in the name of his principal, if he is empowered to draw checks thereon; * * the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary, and the bank is authorized to pay the amount of the deposit or any part thereof, upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit, or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith."

Before the passage of this act, it cannot be questioned that the bank would have been liable to the principal, being governed by the general rule as laid down in the cases cited supra. But from our interpretation of the statute, we are of the opinion that the rule has been changed. The statute outlines a set of facts perfectly analagous to this case and says the bank shall not be put on inquiry unless it had actual knowledge or knowledge of such facts that will constitute bad faith.

Counsel for plaintiff cite the act, but contend the bank should have had actual knowledge; citing as authority cases decided before the passage of the act. The court thinks these cases are no longer an authority upon this subject. It must have been the intention of the legislature on passing this act to change the existing law or it would never have spoken at all upon the subject. The statute very plainly says "the bank shall not be put on inquiry" then qualifies by saying, "unless they had actual knowledge," et cetera. The legislature must have intended "actual knowledge" to constitute more knowledge than is shown from the set of facts. We reiterate that the facts in this case and the wording of the statute are exact in every detail, and the act says that the bank is not put on inquiry. The legislature must have intended actual knowledge to be more than was shown in this case or they would never have added such a qualifying clause. To read the act in any other light would be fallacious. It would be the same as saying, "a bank shall not be put on inquiry when an agent, having authority to draw checks on his principal, deposits such checks to his personal account, but if an agent does such an act, such actions shall constitute actual knowledge on part of the bank and they must be on inquiry." In other words, unless we hold that the knowledge must be more than as shown in

this case, the latter part of the act neutralizes the former part.

In any case similar to this it would be a question of fact whether the bank had knowledge enough to hold them liable. But from the meagre set of facts as given in this case, we hold as a matter of law that the bank is not liable.

Judgment for Defendant.

OPINION OF SUPREME COURT

We can not agree with the learned court below that the adoption of the Uniform Fiduciaries Act of May 31, 1923, P. L. 468 has changed the law of Pennsylvania on the issue presented in the instant case. It must be remembered that many portions of Uniform Acts do not change the existing law but merely reaffirm it. Such is the case here. See Safe Deposit Bank v. Diamond National Bank, 194 Pa. 335. It was there held, in a per curiam decision, that where checks drawn to the order of an administrator are deposited by him in his personal account and he checks out the funds for private purposes, the bank is not liable.

The Uniform Act adopts the same rule of non-liability unless there are additional facts present which constitute actual knowledge or bad faith on the part of the bank. The facts in the instant case are not meagre but constitute the relevant facts in many actual cases. We agree, however, with his determination and his construction of the statute. The federal rule is the same: Trust Co. v. Cahav, 47 Sup. Ct. 661 (1927).

The judgment of the learned court below is affirmed.